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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-803

WILLIAM G. BARRY, as Chairman of the New York State Racing and Wagering Board, et al.,

Appellants,

against

JOHN BARCHI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	PAGE
Opinions and Judgment Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of the Case	3
The questions presented herein are substantial	5
Conclusion	10
Final Judgment Appealed From	1a
Opinion of the Three Judge District Court	3a
Opinion Convening Three-Judge District Court	23a

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants* appeal from the judgment of the United States District Court for the Southern District of New York entered September 15, 1977, enjoining the enforce-

* In addition to the present chairman of the N.Y. State Racing and Wagering Board, appellants include its other members, Bertram D. Sarafan (chairman at the commencement of this action) and Joseph H. Boyd, Jr.; the term of former member Eugene J. Keogh, defendant below, having expired. See U.S. Sup. Ct. Rules, Rule 48 (3). Also appealing are Hugh L. Carey and Louis J. Lefkowitz respectively, Governor and Attorney General of the State of New York. The Governor was apparently named as defendant because of his general executive responsibilities, N.Y. Const. Art. IV, § 3 and the Attorney General because of his responsibility to appear in defense of constitutionality of statutes, N.Y. Executive Law § 71.

ment of N.Y. Unconsolidated Laws § 8022 as being repugnant to the due process and equal protection clauses of the Fourteenth Amendment, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions and Judgment Below

The opinion of the Three-Judge District Court for the Southern District of New York is reported at 436 F. Supp. 775 and is reproduced in the appendix beginning page 3a. The judgment appealed from is reproduced beginning at page 1a of the appendix. The opinion of the District Court granting appellee's motion to convene a three-judge court is not yet reported. It is reproduced beginning at page 23a of the appendix.

Jurisdiction

The judgment of the District Court was entered on September 15, 1977. Notice of Appeal was filed September 26, 1977.

The jurisdiction of this Court to review the judgment by appeal is conferred by 28 U.S.C. § 1253. See, *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804 (1975).

Questions Presented

1. Does a statute providing for summary suspension of the occupational license of a racing industry participant, pending hearing and determination of disciplinary changes, deny licensees due process or equal protection of the laws?

2. Should the District Court have abstained from determining this case until the State courts had ruled on the availability of administrative stays to appellee?

3. Was appellate barred from challenging the statute governing disciplinary action against harness racing licensees by reason of his acceptance of a license?

Statute Involved

New York Unconsolidated Laws § 8022, which is reproduced at footnote 1 of the District Court's opinion, at page 4a.

Statement of the Case

This is an appeal from a judgment of a three-judge District Court for the Southern District of New York, enjoining enforcement of N.Y. Unconsolidated Laws § 8022 as being in violation of the due process and equal protection clauses of the Fourteenth Amendment.

Appellee, a licensed trainer of harness race horses, instituted this action pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), challenging the constitutionality of N.Y. Unconsolidated Laws § 8022 as applied to him. He claimed that § 8022 denied him the right to due process of law in that it denies a licensee a pre-suspension hearing; and, that this statute violated his right to equal protection of the laws because § 8022 precluded stays pending review to harness racing licensees, whereas such a restriction does not apply to thoroughbred racing licensees, (3-5a).*

On July 10, 1976, appellee Barchi's license to train harness race horses was ordered suspended for 15 days by

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* "Appellee also contended that the Board's rules, 9 NYCRR §§ 4116.11, 4120.5 and 4120.60, reproduced at page 5a, establish a constitutionally improper presumption of guilt with respect to the trainer's responsibility drugging of horses and making the trainer an "insurer" of his horse's conditions as a matter of law. Although the court sustained the rule on its face, in view of the disposition of the case, the issue of whether the rule was properly applied was never reached (20-21a).

John F. Fay, presiding steward and judge at Monticello Raceway. This penalty was imposed after traces of the drug "Lasix" had been found in the urine of "Be Alert", one of the horses entrusted to his case. This followed a routine test performed on June 24, two days after "Be Alert" placed second in the third race at Monticello. The administration of such treatment to a harness racing horse within 48 hours is prohibited by New York State Racing and Wagering Board Rule 9 NYCRR 4120.4, (6-7a).

The District Court issued a temporary restraning order on July 13, 1976 enjoining the Board from further execution of its decision. On December 23, 1976, defendants' motion for dismissal of the complaint for lack of subject matter jurisdiction was denied and a three-judge district court was convened, per GOETTEL, J., (5-6a, 23a).

The Board urged the three-judge court to abstain until the State courts passed upon its contention that under its construction of § 8022, it was, in fact, authorized to stay the suspension of a harness racing license, relying upon *Carey* v. *Sugar,* 425 U.S. 73 (1976), (9a). The court acknowledged this doctrine, but felt that the New York Court of Appeals' decision in *Tappis* v. *N. Y. State Racing and Wagering Board,* 36 N Y 2d 862, 330 N.E.2d 697 (1975) constituted authoritative disposition of the question herein. thus paving the way for federal court adjudication, (10-11a).*

The Court held that N.Y. Unconsol. Laws § 8022 was unconstitutional as violative of Barchi's right to due process under the Fourteenth Amendment because it permitted revocation or suspension of a harness race horse trainer's license without either a pre-suspension or prompt post-suspension hearing, (21a).

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* *Tappis* upheld the constitutionality of the Board's rule permitting fines without prior hearings and did not speak to the issue presented here with respect to the Board's construction of its regulations to permit a stay to be granted upon a hearing.

The District Court looked to the nature of the interest to be protected and held it to be an "interest [which] can be an entitlement subject to due process consideration" (13a). The court felt that the statutory protections did not comply with due process procedures according to the balancing of interests involved, as set forth in *Matthew* v. *Eldridge,* 424 U.S. 319 (1976). The court acknowledged the substantial interest of the state, stating that "in appropriate circumstances [it] justifies summary suspension prior to hearing or formal determination" (13-15a). However, the court ruled that the private interest at stake was sufficient to override the state's interest so as to warrant prohibition of the unvariable application of pre-hearing suspension (15-16a).

The court also held that the prohibition of stays pending review in the harness racing industry without a parallel prohibition in thoroughbred racing constituted a denial of equal protection because of the state's failure to show a rational basis for this distinction (21a).

The questions presented herein are substantial

A.

New York is only one of at least twelve states whose racing laws provide for the summary suspension of a licensee pending a hearing on charges of misconduct. See: Delaware Code Ann. 28 § 325, Fla. Code Ann. 550.07, 550.33(2)(a); Ill. Ann. Stat. § 37-16; Kentucky Rev.Stat. 230.320, Md. Ann. Code 78B § 10, Mass. Gen. Laws Ann. 128 A § 11, Mich. Compiled Laws 431-41(3); Montana Rev. Code 62-507, NJ Stat Ann 5:5-51, 52; N.Y. Unconsol. Laws § 8022; Ohio Rev. Code Ann. 3769091; Pa.Stat. Ann. 15 § 2670, W.Va. Code 19-23-2, 3, 16(c). Thus, the instant case will, necessarily, have nation-wide impact.

By voiding New York's disciplinary system, which regulates an industry long recognized to be subject to the state's

police power, *Western Turf Ass'n* v. *Greenberg,* 204 U.S. 354, 363 (1907) and that, but for special legislative dispensation, would be illegal, N.Y. Const., Art. I, § 9, *Ailano* v. *Westchester Racing Ass'n,* 265 App.Div. 225, 229, 38 N.Y.S. 2d 741, 745 (2d Dep't 1942), the District Court has decided the case at bar contrary to this Court's "due process" decisions in such cases as *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), governing discipline of civil servants. *Mathews* v. *Eldridge,* 424 U.S. 236 (1976), governing the discontinuance of disability benefits; *Montayne* v. *Haymes,* 427 U.S. 236 (1976); *Meachum* v. *Fano,* 427 U.S. 215 (1976); governing prison transfer; *Ingraham* v. *Wright,* U.S. (1976), governing corporal punishment in the schools and *Dixon* v. *Love,* 431 U.S. 105 (1977), governing summary suspension or revocation of a driver's license, all of which authorized the imposition of sanctions prior to a hearing. Even in *Goss* v. *Lopez,* 419 U.S. 565 (1975) governing the suspension of pupils from school, this Court authorized summary suspension to protect the safety of persons and property.

Moreover, two United States Courts of Appeals have already ruled that the state interest in regulating the racing industry outweighs the licensee's interest in obtaining a hearing prior to imposition of disciplinary action, *Ruane* v. *N. Y. State Racing & Wagering Board,* 532 F.2d 860 (2d Cir. 1976) and *Hubel* v. *West Virginia Racing Comm.,* 513 F.2d 240 (4th Cir. 1975). See also, *Gilmour* v. *N. Y. State Racing & Wagering Board,* 405 F.Supp. 458 (S.D.N.Y. 1975).

Thus, the District Court ignored the long-established doctrine that "due process, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers* v. *McElroy,* 367 U.S. 886 at 895 (1961). It is "flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer,* 408 U.S. 471 at 481 (1972). With regard

to the deprivation of a "liberty" or "property" interest, "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews* v. *Eldridge, supra,* 424 U.S. at 333 (1976).

While in some circumstances, a hearing is required prior to the deprivation of a protected interest, see *Goldberg* v. *Kelley,* 397 U.S. 254 (1970); *Bell* v. *Burson,* 402 U.S. 535 (1971), this Court repeatedly held that an opportunity to be heard need not be given until some time *after* such deprivation. *Mathews* v. *Eldridge, supra; Arnett* v. *Kennedy, supra; Goss* v. *Lopez, supra; Mitchell* v. *W.T. Grant Co.,* 416 U.S. 600 (1974); *Dixon* v. *Love, supra.*

The District Court, perhaps under constraint of the Second Circuit's *Ruane* decision, *supra,* gave lip service to *Hubel* v. *West Virginia Racing Commission, supra.* However, by attempting to draw factual distinctions that would show pre-hearing sanctions to be inappropriate (15a, et seq.), that court completely ignored the holding of *Hubel* that a state may, *under all circumstances,* despite any loss that a licensee might incur, provide for an absolute pre-hearing suspension rule for racing licensees.

"The state has at least two substantial interests to be served. It has a humanitarian interest in protecting the health of the horse, and it has a broader and more weighty interest in protecting the purity of the sport, both from the standpoint of protecting its own substantial revenues derived from taxes on legalized pari-mutuel betting and protecting patrons of the sport from being defrauded. Collectively, these interests, we think, justify the severe penalty of disqualifying a horse that has been drugged, its trainer and perhaps its owner, from further participation in legalized racing until the matter can be heard and determined and an appropriate final sanction formulated. The combination of strict liability, imposed by Rule 793, and immediate suspension without the possibility of stay, deters

tampering and promotes care. The combination also removes from racing those who have proved either unable or unwilling to protect their horses from unauthorized drugs."

Hubel, supra, 513 F.2d at 243.

The decision of the District Court is further undermined by the fact that it was the deliberate failure of the appellee to seek a hearing under § 8022 that prevented the Board from providing an adequate forum for a final disposition of the disciplinary charges.

As we have demonstrated above, the decisions of this Court, the *Hubel* and the *Ruane* cases, *supra,* it is constitutionally permissible, because of the needs of public safety and welfare, to summarily suspend a horse racing license in a drugging case.* The contrary holding of the District Court is plain error and should be reversed.**

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* Since the commencement of this action, New York has provided in its State Administrative Procedure Act § 401(3), that

> If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered, effective on the date specified in such order or upon service of a certified copy of such order on the licensee, whichever shall be later, pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

The absence of such a finding proved determinative to an intermediate appellate court in *Matter of Gerard* v. *Barry,* —— A D 2d —— (2d Dep't, November 9, 1977), a recent *cause celebre* involving the alleged substitution of horses at Belmont Park by a veterinarian and a trainer. Whether the State Court of Appeals will apply this portion of the Administrative Procedure Act to this case is unknown at this time. However, in the light of *Hubel, supra,* "drugging cases will always present a threat to public safety and welfare."

** The District Court completely ignored one of appellant's threshold arguments, i.e., whether appellee was estopped from chal-

(footnote continued on following page)

B.

In view of the District Court's ruling on appellee's due process claim, its consideration of the equal protection issue was both unnecessary and improper, *Peters* v. *Hobby,* 349 U. S. 331, 338 (1955). In any event, an affidavit submitted by the Board's counsel and chief steward to the Court (28a) and counsel's offer of proof made at argument before the three-judge court, to the effect that harness racing and thoroughbred racing licensees were treated alike in disciplinary matters, because of the way in which the Board construed the statutes, raised sufficient question as to their meaning as to have required the District Court to abstain, *Railroad Commission* v. *Pullman,* 312 U.S. 496 (1941) and *Judice* v. *Vail,* 430 U.S. 327 (1977) and *Carey* v. *Sugar,* 425 U.S. 73 (1976).

In attempting to justify its refusal to abstain, the District Court erroneously relied upon *Matter of Tappis* v. *N. Y. State Racing & Wagering Board, supra.* However, in that case, the New York Court of Appeals limited its decision to the narrow question of the constitutionality of imposing a fine upon a licensee prior to a full hearing. In upholding the constitutionality of such a rule, the Court

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lenging the disciplinary system for harness racing licensees, by reason of having applied for and accepted licensure. As opposed to the question of whether appellee had an interest protected by due process, which is not denied, see *Hubel,* 513 F2d at 242. This is an unsettled question of law which has not been, but should be decided by this Court.

This Court's past decisions have produced conflicting authority on this point, compare *Ashwander* v. *T.V.A.,* 297 U.S. 288, 323, 348 (1936), which precluded a challenge where a statute's benefits have been accepted, with *W. W. Cargill Co.* v. *Minnesota,* 180 U.S. 452, 468 (1901), *contra.* In its most recent comment on this issue, this Court has only underscored the uncertainty that exists over whether the beneficiary of a statute may challenge its constitutionality, see *Arnett* v. *Kennedy,* 416 U.S. 134, 153 (1975).

never reached the issue of whether the applicable statutes and regulations permitted the Board to stay its own suspension pending administrative review.

CONCLUSION

Probable jurisdiction should be noted.

Dated: New York, N. Y.
December 2, 1977

Respectfully submitted,

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• Counsel gratefully acknowledges the assistance of Ms Elise Hagouel Langsam, SUNY at Buffalo, School of Law, class of 1978, and a Legal Aide at the Attorney General's office.

Final Judgment Appealed From.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 3070 GLG

JUDGMENT

JOHN BARCHI,

Plaintiff,

—against—

BERTRAM D. SARAFAN, as Chairman and JOSEPH H. BOYD, JR. and EUGENE J. KOEGH, as Members of the New York State Racing & Wagering Board, Division of Harness Racing, HON. HUGH CAREY, Governor of the State of New York, and HON. LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants.

Plaintiff, having commenced an action against defendants pursuant to 42 U.S.C. 1983 for judgment declaring § 8022 of the Unconsolidated Laws of the State of New York to be unconstitutional and invalid and to nullify the fifteen (15) day suspension imposed upon plaintiff by defendants commencing on the 10th day of July, 1976 and defendants having duly served and filed an answer to the complaint and plaintiff having moved this Court for the convening of a three judge court pursuant to 28 U.S.C. 2881 for the purpose of making a constitutional determination and by order of United States District Court Judge Gerard L. Goettel entered the 23rd day of December, 1976, a three judge court having been convened and the issues herein having come on to be heard by said three judge court on the 4th day of May, 1977 and Joseph A. Faraldo

Final Judgment Appealed From.

having appeared on behalf of the plaintiff and Jesse Moss having appeared Amicus Curaie on behalf of Standardbred Owner's Association in support of the complaint and Assistant Attorney General Robert Hammer having appeared on behalf of the defendants in opposition thereto and due deliberation having been had thereon and the Court having rendered its opinion and order on the 18th day of August, 1977,

Now, on motion of Greco & Faraldo, attorneys for the plaintiff, it is hereby,

ADJUDGED AND DECREED that § 8022 of the Unconsolidated Laws of the State of New York be and the same are hereby declared to be unconstitutional in that it permits the State to irreparably sanction a harness race horse trainer without a pre-suspension or a prompt post-suspension hearing in violation of plaintiffs' right to due process and it prohibits stays of execution of suspension orders pending review of cases of harness racing personnel with a parallel prohibition in thoroughbred racing cases, a separate classification lacking a basis reasonably connected to the State's interests, in violation of plaintiffs' right to equal protection of law and defendants be and they are hereby enjoined from enforcing said statute and it is further,

ADJUDGED AND DECREED that the fifteen (15) day suspension imposed upon plaintiff, to have commenced on the 10th day of July, 1976 had it not been stayed by this, be and the same is hereby declared to be invalid and nullified.

Dated: New York, New York
September 14, 1977

GERARD L. GOETTEL
United States District Court Judge

JUDGMENT ENTERED—9/15/77
RAYMOND F. BURGHARDT
Clerk

Opinion of Three Judge District Court.

John BARCHI, Plaintiff,

v.

Bertram D. SARAFAN, as Chairman and Joseph H. Boyd, Jr., and Eugene J. Keogh, as Members of the New York State Racing & Wagering Board, Division of Harness Racing, Hon. Hugh Carey, Governor of the State of New York, and Hon. Louis J. Lefkowitz, Attorney General of the State of New York, Defendants.

No. 76 Civ. 3070 (GLG).

United States District Court,
S. D. New York.

Aug. 18, 1977.

As Amended Sept. 5, 1977.

Greco & Faraldo, Kew Gardens, for plaintiff; by Joseph Faraldo, Kew Gardens, of counsel.

Louis J. Lefkowitz, Atty. Gen., New York City, for defendants; by Robert S. Hammer, New York City, of counsel.

OPINION

Before TIMBERS, Circuit Judge, and GRIESA and GOETTEL, District Judges.

GOETTEL, District Judge.

Plaintiff, John Barchi, is a duly licensed harness racing trainer. Defendants are the New York State Racing and Wagering Board (NYSRWB) and the individual members

of the Board (the Governor and State Attorney General have also been cited as parties defendant). On July 12, 1976 plaintiff commenced this action pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1343(3), 2281 *et seq.*, challenging the constitutionality of New York Unconsolidated Law § 8022[1] (McKinney 1961) and NYSRWB Rules 4120.5,

[1] New York Unconsolidated Law § 8022 provides:

> If the state harness racing commission shall refuse to grant a license applied for under this act, or shall revoke or suspend such a license granted by it, the applicant or licensee may demand, within ten days after notice of the said act of the commission, a hearing before the commission and the commission shall give prompt notice of a time and place for such hearing at which the commission will hear such applicant or licensee in reference thereto. Pending such hearing and final determination thereon, the action of the commission in refusing to grant or in revoking or suspending a license shall remain in full force and effect. The commission may continue such hearing from time to time for the convenience of any of the parties. Any of the parties affected by such hearing may be represented by counsel, and the commission may be represented by the attorney-general, a deputy attorney-general or its counsel. In the conduct of such hearing the commission shall not be bound by technical rules of evidence, but all evidence offered before the commission shall be reduced to writing, and such evidence together with the exhibits, if any, and the findings of the commission, shall be permanently preserved and shall constitute the record of the commission in such case. In connection with such hearing, each member of the commission shall have the power to administer oaths and examine witnesses, and may issue subpoenas to compel attendance of witnesses, and the production of all material and relevant reports, books, papers, documents, correspondence and other evidence. The commission may, if occasion shall require, by order, refer to one or more of its members or officers, the duty of taking testimony in such matter, and to report thereon to the commission, but no determination shall be made therein except by the commission. Within thirty days after the conclusion of such hearing, the commission shall make a final order in writing, setting forth the reasons for

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4120.6 and 4116.11,[2] 9 NYCRR 4120.5, 4120.6, 4116.11 as they had been applied by the NYSRWB against him. Upon

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> the action taken by it and a copy thereof shall be served on such applicant or licensee, as the case may be. The action of the commission in refusing to grant a license or in revoking or suspending a license shall be reviewable in the supreme court in the manner provided by and subject to the provisions of article seventy-eight of the civil practice act. L.1940, c. 254, § 47; amended L.1954, c. 5, § 6; L.1954, c. 510, § 8; L.1959, c. 881, § 8, eff. July 1, 1959 (pocket part).

By provision of Unconsolidated Law § 8162 the New York State Racing and Wagering Board assumed the powers of the racing commission.

[2] The pertinent NYSRWB Rules provide as follows:

Rule 4116.11 Trainer's responsibility. A trainer is responsible for the condition, fitness, equipment and soundness of each horse at the time it is declared to race and thereafter when it starts in a race.

Rule 4120.05 Presumptions. Whenever the tests or tests prescribed in § 4120.1 hereof disclose the presence in any horse of any drug, stimulant, depressant or sedative, in any amount whatsoever, it shall be presumed:

(a) That the same was administered by a person or persons having control and/or care and/or custody of such horse with the intent thereby to affect the speed or condition of such horse and the result of the race in which it participated; (b) that it was administered within the period prohibited by subdivision (d) of § 4120.4 of this Part; and (c) that a sufficient quantity was administered to affect the speed or condition of such animal.

Rule 4120.6 Trainer's responsibility. A trainer shall be responsible at all times for the condition of all horses trained by him. No trainer shall start a horse or permit a horse in his custody to be started if he knows, or if by the exercise of reasonable care he might have known or have cause to believe that the horse has received any drugs, stimulant, sedative, depressant, medicine, or other substance that could result in a positive test. Every trainer must guard or cause to be guarded each horse trained by him in such manner and for such period of time prior to racing the horse so as to prevent any person not employed by or connected with the owner or trainer from administering any drug, stimulant, sedative, depressant or other substance resulting in a positive test.

plaintiff's posting of security the Court, on July 13, 1976, temporarily restrained defendants from further execution of the Board's disputed decision and defendants, in turn, moved for dismissal of the complaint for lack of subject matter jurisdiction. On December 23, 1976, defendants' motion was denied and a three-judge court was convened. (Two companion cases, making similar constitutional challenges, brought after the abolition of three-judge courts on August 13, 1976 have been held in abeyance pending the decision of this Court.)

The facts which gave rise to the case are these: "Be Alert" is a harness race horse, owned by an uninvolved third party, and trained at the time this suit was brought by the plaintiff. On June 22nd, "Be Alert" ran in the third race at Monticello Raceway[3] and placed second. Two days later plaintiff was informed by the presiding steward[4] at Monticello that a post-race urinanalysis revealed the presence of "Lasix"[5] in "Be Alert's" system. Such treatment of a harness race horse is improper within forty-eight hours of a race and violates NYSRWB Rule 4120.4. Barchi declared his innocence in the matter. Thereafter, he was not given access to the analysis, the specimen, and was never confronted with the circumstances under which it was taken.

On June 28th plaintiff voluntarily took a polygraph examination in an effort to establish his non-involvement. The examiner reported that the plaintiff was not lying. A subsequent polygraph examination was administered to

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[3] The harness track is located in Sullivan County, New York and its race "meeting" schedule is of approximately seven months duration each year.

[4] *See* N.Y.Uncons.Law § 8009 (McKinneey 1961).

[5] "Lasix" is acknowledged by the parties to be a drug used to clear a horse's sinuses but which may have a stimulative effect on an animal's race performance.

plaintiff at the behest of the NYSRWB the next day and the results were similarly exculpatory. Nevertheless, on July 10th, plaintiff received a fifteen-day suspension for violation of the so-called trainer's "insurer" rule from John Fahey, the presiding steward and judge at Monticello. During the period of his suspension no horse of which he was the trainer would be allowed entry in races at the track.

Race horse trainers may be entrusted with the care of a number of trotters at any given time. A trainer's income is derived in large measure from the proceeds of horse races (as opposed to a salary), and, since, harness "meetings" are sporadic, trainers cannot recapture the racing opportunities lost by missed meetings. Once a trainer is suspended, even for a brief period, an owner will immediately seek the services of another trainer so that the horse is not barred from racing. This change is often permanent in order to avoid further disruption in the care of the animal. Significantly, plaintiff has proffered the affidavit of a third-party trainer/driver who experienced just such a loss during a suspension for a similar drug infraction. He had also suffered irreparable damage for a subsequent *ex parte* suspension that was later reversed. Racing opportunities lost because of a suspension cannot be recovered by a later reversal in an review hearing for obvious reasons. Furthermore, defendants do not dispute the fact that a loss of horses in a trainer's stable occasioned during his suspension can often be an irremediable injury, even though such suspension is erroneous and without justification.

Defendants note that at Monticello (and presumably at other NYSRWB harness tracks) a prohibition on medication of horses within 48 hours of a race is enforceable since entries are made three days prior to race time. At Monticello, the horses for all the day's races are brought into a state-secured paddock prior to the first race of the day.

Pre-race tests are performed there to determine if a horse has been drugged. (Pre-race testing is not done on thoroughbred race horses.) "Be Alert's" pre-race blood test was negative. (A different type of test, after the race, detected the drug.)

Defendants admit that an unsuccessful attempt was made to determine the actual party responsible for the drugging of "Be Alert" and that only after such efforts proved fruitless was plaintiff suspended under the trainer "insurer" rule. This action was deemed necessary by the judges "to protect the integrity and reputation of the sport and to insure public confidence." Defendants note that, historically, both harness tracks and state authorities have found it imperative that racing be conducted fairly both in fact and in appearance and that even the specter of impropriety has been enough to cause disorders at the tracks, with resulting jeopardy to the safety of members of the public and the industry. (There is no indication that the events in dispute here caused any such disorders.)

Plaintiff challenges Section 8022 on due process and equal protection grounds. He contends, with respect to the former, that the statute denies a trainer any opportunity to confront and contest an accusation of dishonesty before a suspension has been both ordered and, in many cases, executed. On equal protection grounds the plaintiff contests the prohibition on stays which exist in the harness racing provisions of the Unconsolidated Laws but which do not exist in the thoroughbred racing provisions. Finally, plaintiff challenges the NYSRWB Rules which establish a presumption of deliberate drugging and make the trainer an "insurer" of his horses' conditions as a matter of law.

Defendants respond by asserting that the procedures established by Section 8022 and the NYSRWB Rules are a valid exercise of the state police power and are a fair response to the potential for corruption in the heavily regu-

lated racing industry. Furthermore, they argue that this Court should not exercise jurisdiction over plaintiff's claims until the New York state courts have been given an opportunity to review the issues presented. While this action is clearly within the jurisdiction of the Court, the defendants argue for abstention from the exercise of such jurisdiction pending an "authoritative" state interpretation of Section 8022, citing *Carey* v. *Sugar,* 425 U.S. 73, 96 S.Ct. 1208, 47 L.Ed.2d 587 (1976) and *Zwickler* v. *Koota,* 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967).

A federal court's discretion to abstain, in cases otherwise within the court's jurisdiction, when the controversy involves unsettled issues of state law, was first extensively discussed in *Railroad Commission of Texas* v. *Pullman,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). In reversing a three-judge court's decision enjoining enforcemeent of a Texas Railroad Commission order, Justice Frankfurter criticized the wisdom of basing federal constitutional determinations (in *Pullman,* a Thirteenth Amendment decision) on unsettled state law foundations. In such situations, *Pullman* reasoned, the trial court should abstain from deciding the case until the state court decides the state law issues. 312 U.S. at 500, 61 S.Ct. 643.

While the *Pullman* doctrine has been expanding in recent cases, *see, e.g., Trainor* v. *Hernandez,* —— U.S. ——, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977); *Juidice* v. *Vail,* —— U.S. ——, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977); *Younger* v. *Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971);[6] the clearest statement of the test to be applied in the instant case is found in *Harman* v. *Forssenius,* 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50 (1965). In that case the Supreme

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[6] The instant case does not come within the *Younger* abstention doctrine because there is no state court action presently pending. *See Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 3 n.1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974).

Court reviewed a three-judge court's decision striking down a Virginia poll tax provision as violative of Art. I, § 2 and the Seventeenth Amendment to the Constitution. In reaching a decision on the merits the court refused Virginia's request for abstention in order to first allow the state courts to pass on the state law. In affirming the lower court refusal to abstain, the Supreme Court stated:

> Where resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law and premature constitutional adjudication. *E.g., Railroad Comm'n* v. *Pullman Co., supra.* The doctrine, however, contemplates that deference to state court adjudication only be made where the issue of state law is uncertain. . . . Thus "recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law." *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411, 415-16 [84 S.Ct. 461, 465, 11 L.Ed.2d 440].

Harman v. *Forssenius,* 380 U.S. at 534-35, 85 S.Ct. at 1182.

Is the question concerning the constitutionality of Section 8022 an open question of state law? We think not. In *Tappis* v. *New York State Racing and Wagering Board, Harness Racing Division,* 36 N.Y.2d 862, 370 N.Y.S.2d 922, 331 N.E.2d 697 (1975), the Court of Appeals, in a review of sanctions against a harness trainer, explicitly upheld the constitutionality of the provisions challenged in the instant case. The Appellate Division had set aside the confirmation of a fine levied on a trainer in accordance with its holding that the NYSRWB Rules permitting fines without prior

hearings were unconstitutional. 46 A.D.2d 613, 359 N.Y.S.2d 780 (1st Dep't 1974). The Court of Appeals reversed, and held that

> [t]he compelling and substantial State interest involved in maintaining discipline among trainers and owners . . . so as to preclude the appearance or the fact of impropriety, justifies on-the-spot sanctions and penalties in advance of hearings, and the procedure . . . followed involved no infringement of petitioner's constitutional rights and complied sufficiently with the requirements of the due process clauses of the Federal and State Constitutions.

36 N.Y.2d at 863, 370 N.Y.S.2d at 923, 331 N.E.2d at 698.

[1] Thus, as to the threshold due process question, the State of New York has clearly passed upon Section 8022. With regard to equal protection, the statute explicitly states that pending an administrative hearing "the action of the commission . . . in revoking or suspending a license shall remain in full force and effect." While there may be some doubt whether, in the absence of such mandatory language, a rule absolute could be inferred, the present state of Section 8022 needs no further clarification. Conversely, Section 7915 clearly contains no such prohibition when dealing with sanctions in thoroughbred racing. Where no uncertainty exists in state law there is no need for federal deference to a state court ruling. *Davis* v. *Mann,* 377 U.S. 678, 690, 84 S.Ct. 1441, 12 L.Ed.2d 609 (1964).[7]

Section 8022 permits the presiding NYSRWB Steward to revoke or suspend a harness race horse trainer's license

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[7] It might also be noted that this opinion will result in little interference with state functions since defendants argue that they already have the power to follow the procedures mandated herein.

by issuing notice of such action. Within ten days after notice the licensee may make a demand for a review hearing before the full Board. The Board must, in turn, "give prompt notice of a time and place for such hearing" but may continue the hearing "from time to time for the convenience of any of the parties." When the hearing is completed the Board has 30 days to issue a final order. Pending final order, the original suspension or revocation remains in full force and effect. Thus, it is clear that, even without continuances of the review hearing, a trainer may wait over a month for a review decision. During this time, as the parties concede, a brief suspension, such as is involved here, will have been completely served. Exoneration by a review board cannot restore lost racing dates and terminated training contracts.

Defendant argues that the trainers accept their licenses with full knowledge and understanding of the NYSRWB rules and procedures and, therefore, cannot be heard to complain about them. In addition, the state points to its compelling interest in insuring honest racing in an industry that provides large sums of money for the state treasury. Furthermore, the need to protect the public from dishonesty and from the potential for violence that attends public perception of racing dishonesty justifies the strict enforcement standards in the harness race industry.

[2-4] In evaluating a due process claim the Court's focus is not upon whether the plaintiff's interest is a "right" as opposed to a "privilege." *Board of Regents* v. *Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Consequently, defendant's argument that a licensee cannot complain of the terms of enforcement in a regulated industry is not persuasive. The appropriate opening question for the Court concerns the *nature* (as opposed to the *weight*) of the interest to be protected. *Goss* v. *Lopez,* 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); *Board of Regents* v. *Roth,*

supra. A licensee's interest can be an entitlement subject to due process consideration, especially when the suspension or revocation by the licensing body is based upon a determination of licensee fault or misconduct. *Bell* v. *Burson,* 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); see also *Connell* v. *Higginbetham,* 403 U.S. 207, 91 S.Ct. 1772, 29 L.Ed.2d 418 (1971). Therefore, it is the Court's finding that the nature of a trainer's license in New York and the state's *ratio decendi* in suspending it entitles the holder to due process protection.

[5] Once an interest is found to warrant due process consideration, it must be decided which protections are particularly applicable. *Morrissey* v. *Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). As Justice Powell has noted in *Arnett* v. *Kennedy,* 416 U.S. 134, 168, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (concurring opinion), the procedures which due process requires under a given set of circumstances depend upon balancing the governmental interest against the private interest affected. Conducting a hearing prior to termination is not a rigid requirement of due process. *Board of Regents* v. *Roth, supra.* The state may, even in the absence of dire peril or an imminent emergency, demonstrate the primacy of its interests over those of the plaintiff and, in such cases, termination may precede a promptly-held post-termination hearing. *Goss* v. *Lopez, supra; Arnett* v. *Kennedy, supra.* In *Matthews* v. *Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) the Supreme Court has fashioned the following factors applicable to a due process determination:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures

> used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional substitute procedural requirements would entail.

Matthews v. *Eldridge,* 424 U.S. at 335, 96 S.Ct. at 903.

The private interest at stake is, simply, the right to a livelihood. Plaintiff has convincingly demonstrated that a trainer, once his license is suspended, rightly or wrongly, is potentially subject to a loss of clients and an irretrievable loss of income from any race meeting in progress. The state, undeniably, has compelling interests to be considered. Racing is a strictly-regulated activity in New York. Defendant correctly notes that there is a heavy flow of cash in racing, both in purses and wagers, as well as substantial tax revenues from levies on racing. As has been aptly observed by Judge Weinfeld, in *Gilmour* v. *N.Y.S. Racing & Wagering Board,* 405 F.Supp. 458, 460-61 (S.D.N.Y.1975):

> [t]he state's interest essentially reflects the public interest that sports be honestly conducted, which extends to the avoidance of even the appearance of impropriety in connection with pari-mutuel betting. The state also has a substantial monetary interest since it receives vast sums from the proceeds of racing meets. . . . .
>
> [S]uspicious race results have resulted in fans rioting at race tracks, causing both personal injury and property damage. Thus, the need to maintain strict vigilance against race fixing and to take immediate steps against dishonest drivers and owners is of prime importance in the long run and perhaps in the short run as well. It is important to the public no less than to those who run the raceways.

[6] The state's interest in preventing fraud at the track and in insuring public confidence is substantial and, in appropriate circumstances, justifies summary suspension prior to hearing or formal determination. *Hubel* v. *West Virginia Racing Commission,* 513 F.2d 240 (4th Cir. 1975). It remains to be considered, however, whether the invariable application of this procedure, from which no stay is available, provides constitutional due process when the reviewing process becomes meaningless.

It can be stated with certainty that the plaintiff's interest in this case is more substantial than those private interests in both *Arnett* v. *Kennedy, supra* and *Goss* v. *Lopez, supra,* since the loss herein is both irreparable and substantial.

In balancing the relative weight of these interests against the state's it is well to note that even though the state alleges a need for immediate action, the initial suspension decision in plaintiff's case took sixteen days. In light of the time the state is presently taking in such matters, requiring either a stay, as allowed in thoroughbred racing, or a prompt hearing if same is granted, results in little "interference" in track supervision. A prompt hearing and determination could well have been conducted within the sixteen days the state took in imposing its "immediate" sanctions in the case. Moreover, since Section 8022 already provides for Board review hearings, requiring the expedition of such hearings is a scant additional burden for the state.

Another of the *Eldridge* factors to be considered is the risk of an erroneous deprivation extant in the current procedures. Plaintiff has argued that the combination of the presiding Steward's power to suspend immediately and the Board's power to control the pace of the hearings, make the review by the Board an exercise in futility and renders the initial suspension order, in fact, irreversible. There is an inherent revulsion against a system which,

as has occurred in this case, favors quick sanctions, even in the face of a demonstration of innocence, at the expense of an accurate determination of responsibility. In the present case, the plaintiff submitted himself to two polygraph examinations, one at the Board's behest. Both examinations indicated plaintiff's innocence in the drugging of "Be Alert." There would appear to be little more that the plaintiff could have done to demonstrate a lack of culpability. Nevertheless, the presiding Steward ordered a suspension. No great urgency was apparent here. A hearing prior to the administering of sanctions, or a stay pending review, would have given the Commission the opportunity to review the Steward's action.

[7, 8] The opportunity to be heard in review of a state sanction must be available in a meaningful manner and at a meaningful time. *Armstrong* v. *Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). On balance, the Court concludes that the absence of either a pre-suspension hearing or a *prompt* post-suspension hearing denies plaintiff the meaningful review due process requires. *Bell* v. *Burson, supra; Armstrong* v. *Manzo, supra.*

Plaintiff's equal protection challenge to Section 8022 is based upon a distinction with New York Unconsolidated Law Section 7915,[8] the procedure for suspension and revo-

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[8] N.Y.Uncons.Law § 7915 provides, in pertinent part:

> No license shall be revoked unless such revocation is at a meeting of the state racing commission on notice to the licensee, who shall be entitled to a hearing in respect of such revocation. In the conduct of such hearing the commission shall not be bound by technical rules of evidence, but all evidence offered before the commission shall be reduced to

(footnote continued on following page)

cation of persons licensed in the thoroughbred race horse industry, which is substantially identical to Section 8022's procedures, excepting the absence in the former of prohibition of stays of execution of suspensions and revocations pending review. Plaintiff argues that this difference in treatment is an unconstitutional denial of equal protection of law. Defendant's response is unique. After having argued in opposition to the due process challenge, that swift, even Draconian, enforcement is a necessary weapon in the regulation of harness racing, defendant now argues on the equal protection issue that the NYSRWB has "interpreted" Section 8022 and Section 7915 to allow stays of execution in both types of racing and that, as a matter of practical operation, the NYSRWB has attempted to treat all racing personnel in the same manner. Defendant claims that since the Board has decided that it can, as a matter of administrative grace, grant stays in the harness industry, there are no differences in treatment between thoroughbred and harness racing and, therefore, there is no equal protection issue.

(footnote continued from preceding page)

> writing, and such evidence together with the exhibits, if any, and the findings of the commission, shall be permanently preserved and shall constitute the record of the commission in such case. The action of the commission in refusing, suspending or in revoking a license shall be reviewable in the supreme court in the manner provided by and subject to the provisions of article seventy-eight of the civil practice act. Such hearing may be held by the chairman thereof or by any commissioner designated by him in writing, and the chairman or said commissioner may issue subpoenas for witnesses and administer oaths to witnesses. The chairman or commisioner holding such hearing shall, at the conclusion thereof, make his findings with respect thereto and said findings, if concurred in by two members of the commission, shall become the findings and determination of the commission.

[9] As is noted in the order of December 23, 1976, Section 8022 creates no "suspect classifications"[9] and involves no "fundamental interests."[10] Therefore, the test to be applied in evaluating an equal protection claim is "traditional"—whether or not the classification is without a reasonable basis. *Shapiro* v. *Thompson,* 394 U.S. 618, 638 n.20, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). In other words, is there a rational state interest (in the protection of the integrity of harness racing) reasonably connected to classifying the harness racing sector (in which stays are prohibited) separately from the thoroughbred racing section (in which stays are not)? Defendant argues that the disparate treatment is justifiable because the harness racing meetings are more susceptible to corruption and, therefore, the Section 8022 enforcement system is a necessary bulwark of integrity and public confidence in the harness sector. Defendant has been offered an opportunity to prove the existence of such difference and to prove that they reasonably relate to the differences in treatment effected by Sections 7915 and 8022 but has not come forward with any proof. Where the state attempts to justify such action "as a rational means for the accomplishment of some significant state policy [it] requires more than a bare assertion based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy." *Carey* v. *Population Services*

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[9] *See, e.g., Brown* v. *Board of Education,* 347 U.S. 483, 74 S.C. 686, 98 L.Ed. 873 (1954) (race); *Examining Board of Engineers, Architects and Surveyors* v. *Flores De Otero,* 426 U.S. 572, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976) (alienage); *but see San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (rejecting "wealth").

[10] *See, e. g., Shapiro* v. *Thompson,* 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (right to travel); *Dunn* v. *Blumstein,* 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (right to vote).

International, —— U.S. ——, ——, 97 S.Ct. 2010, 52 L.Ed. 2d 675 (1977).

While greater dishonesty (if it exists) may counsel greater diligence in the enforcement of NYSRWB rules in the harness industry, it bears little relation to the stay-prohibitive classification set up by Section 8022. The grant or denial of a stay is an individual determination. Even if a factually unsupported assertion of greater corruption in the harness industry is accepted by the Court, there is no relationship between a stay's availability and such probabilities of corruption.

> A legislative classification must contribute substantially to the achievement of the state's purpose. . . . [G]rossly overinclusive or underinclusive classifications should not readily be tolerated. Nor should a reviewing court defer to imaginable facts that might justify the classification. But account should be taken of legislative realities and the need for legislative flexibility. In short, a legislature should be able to adopt any means that are reasonably effective in achieving a valid legislative end or ends. *Boraas* v. *Village of Belle Terre,* 476 F.2d 806, 821-22 (2 Cir. 1973) (dissenting opinion), *rev'd,* 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974).

[10] If the state could show that harness racing was more prone to corruption or fradulent manipulation, then there might be justification for imposing stricter sanctions, but it has hardly supported the separate procedural classification established by Section 8022. The record is devoid of any rational state interest reasonably connected to the differences in treatment accorded harness and thoroughbred personnel. The Court finds, therefore, that the prohibition of stays pending review in harness racing constitutes a denial to plaintiff of equal protection of law and

is a further constitutional impediment to the enforcement of the rules.

The final question for the Court is whether NYSRWB Rules 4116.11, 4120.5 and 4120.6 establish a constitutionally improper presumption of guilt. While the parties seem to be in agreement that Rule 4120.5 establishes a presumption of fact as to a drugged horse and that Rules 4120.6 and 4116.11 establish the trainer as an insurer of a horse's condition as a matter of law, these interpretations have never had the benefit of state court interpretation. The earliest case on the constitutional standards applicable to presumptions is *Mobile, J & K.C.R. Co.* v. *Turnipseed,* 219 U.S. 35, 31 S.Ct. 136, 55 L.Ed. 78 (1910) which dealt with a Mississippi statutory presumption of railroad negligence upon proof of employee injury suffered in the course of employment. In sustaining the operation of the presumption the Court opined that the equal protection test to be applied to a presumption was whether there was a rational connection between the fact proven and the ultimate fact presumed. The Supreme Court has retained this "rational connection test" in subsequent cases. *Tot* v. *United States,* 319 U.S. 463, 63 St.Ct. 1241, 87 L. Ed. 1519 (1943); *McFarland* v. *American Sugar Co.,* 241 U.S. 79, 36 S.Ct. 498, 60 L.Ed. 899 (1916).[11]

[11] Plaintiff concedes that the evidentiary presumption is rebuttable. The Court finds that the duty of a trainer to oversee his horses is sufficiently connected to the occurrence of tampering to support the presumption established by

[11] While a shift to the more stringent "reasonable doubt" standard may be occurring in criminal cases, *see Turner* v. *United States,* 396 U.S. 398, 416, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970); *Leary* v. *United States,* 395 U.S. 6, 36 n. 64, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); it does not apply to the case at bar.

the trainer's "insurer" rules. The state's definition of trainer responsibility is reasonably related to the interests involved and, given the rebuttable nature of the 4120.5 presumption, the high standard of accountability is not unconstitutional. Whether the application of the rules in plaintiff's case was constitutionally proper is not a matter we need consider in light of the absence of an opportunity for meaningful administrative review.[12]

Therefore, the Court finds N.Y.Uncons.Law Section 8022 unconstitutional for two distinct reasons. First, it permits the state to irreparably sanction a harness race horse trainer without either a pre-suspension or a prompt post-suspension hearing, in violation of plaintiff's right to due process. Secondly, it prohibits stays of execution of suspension orders pending review in cases of harness racing personnel without a parallel prohibition in thoroughbred racing cases—a separate classification lacking a rational basis reasonably connected to the state's interests—in violation of plaintiff's right to equal protection of the law.

SO ORDERED.

GRIESA, District Judge, concurring.

I concur with the majority opinion, insofar as it declines to rule unconstitutional NYSRWB Rules 4120.5, 4120.6 and 4116.11, 9 NYCRR 4120.5, 4120.6 and 4116.11.

I also concur with the majority holding as to Section 8022, but with a few additional comments.

Section 8022 gives the Board discretion to impose sanctions, such as revocation of license, prior to hearing. The

[12] Had a stay been granted and had the Commission upheld the steward's action, exhaustion of state remedies would appear to be prerequisite to application for relief by this Court, particularly in light of the absence of authoritative New York State construction of the "insurer risk."

statute provides for a hearing by the Board at the request of an aggrieved party, but states:

> "Pending such hearing and final determination thereon, the action of the commission in refusing to grant or in revoking or suspending a license shall remain in full force and effect."

The majority opinion interprets this language as *prohibiting* the Board from granting a stay of a sanction pending a hearing. Thus, as the majority reads the statute, the Board or its representative has the power to impose immediate severe economic sanctions without a hearing, and is prevented from even considering an application for a stay pending a hearing no matter what good cause is shown.

Although it might be possible to construe the statute in some other way, I must agree that the majority's interpretation is based upon the obvious meaning of the language. And, under this interpretation, there are the violations of due process and equal protection which the majority condemns.

However, in my view (and I believe this to be the meaning of the majority opinion also) Section 8022 would not be constitutionally defective, if the language quoted above about the prohibition on stays were eliminated or were replaced with a provision allowing the Board to have the discretion to grant a stay pending a hearing. This means that the statute would be constitutionally proper if it granted the Board the discretion to impose pre-hearing sanctions, if this were coupled with the discretion to stay such sanctions pending a hearing.

Opinion Convening Three-Judge District Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 3070 (GLG)

OPINION

JOHN BARCHI,

Plaintiff,

—against—

BERTRAM D. SARAFAN, as Chairman and JOSEPH H. BOYD, JR. and EUGENE J. KEOGH, as Members of the NEW YORK STATE RACING & WAGERING BOARD, Division of Harness Racing, HON. HUGH CAREY, Governor of the State of New York, and HON. LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants.

APPEARANCES:

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Opinion Convening Three-Judge District Court.

GOETTEL, D. J.

The plaintiff questions the constitutionality of certain regulations of the New York State Racing and Wagering Board and seeks the convocation of a three-judge court, pursuant to 28 U.S.C. § 2881, for the purpose of making this constitutional determination.[1]

The plaintiff is a harness racing trainer licensed by the New York State Racing and Wagering Board ("Board"). On June 22, 1976, one of the horses trained by him, "Be Alert", participated in the third race at the Monticello (New York) Race Track, placing second. On June 24, 1976, an official of the Board advised the plaintiff that tests revealed the existence of the drug "Lasix"[2] in the horse's system. Rule 4120.4 of the Board's regulations proscribes the use of "Lasix" within forty-eight hours before a race. Plaintiff responded by denying any knowledge of, or involvement in, the alleged treatment. On June 28th and on June 29th, the plaintiff underwent separate polygragh examinations (the former arranged by the plaintiff, the latter by the Board), both of which indicated that his denial of wrongdoing was truthful.

Read together, Rules 4120.5, 4120.6 and 4116.11 of the Board provide the presumption that, when a harness racing horse has been drugged, it was either administered by the trainer or resulted from his negligence in failing to adequately protect against such occurrence. In apparent reliance upon this so-called "insurer" rule, the Board suspended plaintiff for fifteen days as a result of the drugging of "Be Alert", effective July 10, 1976.

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[1] This action was commenced shortly before the effective date of the amendment to 28 U.S.C. § 2881.

[2] "Lasix" is a type of medication prescribed to clear the sinus cavity of a horse. Its use, however, has the attendant effect of improving the animal's endurance for a short time after its administration.

Opinion Convening Three-Judge District Court.

Section 8022 of the Unconsolidated Laws of New York provides that the decision of the Board to suspend the licensee is appealable, with an attendant right to a hearing, within ten days after notice of suspension. However, the Commission has up to thirty days after this hearing within which to issue its final written order. Consequently, for all intents and purposes the fifteen-day suspension imposed upon the plaintiff would most assuredly have run before his appeal would be decided. Section 8022 prohibits the imposition of temporary relief from this suspension pending appellate administrative review of the Board's action.

On July 12, 1976, the plaintiff brought this action seeking that these provisions be declared unconstitutional.[3] Plaintiff contends that as a result of the suspension the horse owners must hire new trainers, due to the need to maintain continuous care for their animals. Therefore, the plaintiff faces not only the loss of income during the suspension period but, more seriously, the likelihood of permanent loss of employment where an owner may wish to avoid another change in the personal care of the horse. A restraining order was entered by the Court staying enforcement of the penalty pending further order of the Court.

The Court is presently faced with a motion by the defendant to dismiss the complaint pursuant to Rule 12 of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. As a result of a recent statutory amendment drastically limiting the use of three-judge panels, effective August 13, 1976, (*see* 45 U.S.L.W. 1, August 12, 1976), this will be one of the last instances where

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[3] The jurisdictional predicate for the attacks on Section 8022 and Rule 4105.8(f) was 42 U.S. § 1983 and 28 U.S.C. §§ 1343(3), 2281 et seq., and it was suggested that the remaining claim rested on pendent jurisdiction.

review by such panels is available. It is still the function of a single judge, however, to determine whether the claim requires the convocation of the three judge court. For the reasons stated below it appears that such a forum is required here.

The underlying rationale for the three-judge court concept is the desire to minimize interference in state matters by the federal judiciary. *See generally* 1A(2) Moore's Federal Practice ¶ 0.205. Nevertheless, such review is available (with its attendant declaratory and injunctive relief potential) where there is a "substantial" constitutional attack upon a state statute. *Goosby* v. *Osser,* 409 U.S. 512 (1974). In determining "substantiality" the Supreme Court has formulated a two-pronged test. On the one hand, the Court has said that such a constitutional attack will fail as "insubstantial" where it is "obviously without merit", *Ex parte Poresky,* 290 U.S. 30, 32 (1933), "obviously frivolous", *Hannis Distilling Co.* v. *Baltimore,* 216 U.S. 285, 288 (1910), "wholly insubstantial". *Bailey* v. *Patterson,* 369 U.S. 31, 33 (1962), or "essentially fictitious", *id.* The instant claims, described below, clearly do not fall within these classifications.

The second aspect, concisely stated by the Court in *Goosby,* is that

> "claims are constitutionally insubstantial only if the prior decisions [of the Supreme Court] inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281."

409 U.S. at 518.

Section 8022 of the Unconsolidated Laws of New York contains the regulatory procedures of the State Harness Racing Commission with regard to the granting of licenses

and suspension and revocation of such licenses. It provides, *inter alia,* that within ten days after notice of suspension a licensee may demand a hearing before the Commission for the purpose of reviewing the Board's order. Section 8022 goes on to state that "[p]ending such hearing and final determination thereon, the action of the commission in . . . suspending a license . . . *shall remain in full force and effect.*" [Emphasis added.] The comparable regulations for thoroughbred racing are contained in Section 7915 of the Consolidated Laws of New York. Therein, unlike under the harness racing provision, no prohibition against a temporary stay pending administrative review exists. Based upon this statutory conflict plaintiff claims that he is being deprived of equal protection of the law since, as a harness racing licensee, he is expressly prohibited from obtaining temporary relief from his suspension while a similarly situated person in the thoroughbred racing industry is not so precluded.

In reviewing equal protection claims the courts have traditionally used a two-tiered analysis of the rights and interests involved. In situations involving "suspect classifications",[4] or "constitutional rights",[5] strict judicial scrutiny of the challenged classifications has been employed requiring proof of a "compelling state interest" in order to withstand the attack. *Shapiro* v. *Thompson, supra* at 638. We agree with the contention of the defendant that such rights are not involved in the instant case so that this degree of review is inappropriate here.

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[4] *See, e.g., Brown* v. *Board of Education,* 347 U.S. 483 (1954) (race); *Examining Board of Engineers, Architects and Surveyors* v. *Flores De Otero,* —— U.S. ——, 96 S.Ct. 2264 (1976) (alienage); *but see San Antonio School District* v. *Rodriguez,* 411 U.S. 1 (1973) (rejecting "wealth").

[5] *See, e.g., Shapiro* v. *Thompson,* 394 U.S. 618 (1969) (right to travel); *Dunn* v. *Blumstein,* 405 U.S. 330 (1972) (right to vote).

In other equal protection cases the courts have applied the "rational basis" test wherein, as the label implies, there is a search for a rational basis between the classification and the purported legislative objective. *Dandridge* v. *Williams,* 397 U.S. 471 (1970). Recent decisions of the Supreme Court suggest that even this test triggers meaningful consideration of the classification. *See e.g., Reed* v. *Reed,* 404 U.S. 71 (1971). *See generally* Gunther, The Supreme Court, 1971 Term—Foreword: In Search of *Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection,* 86 Harv.L.Rev. 1 (1972).

The record in the instant case, however, is presently devoid of "any state of facts [that] reasonably may be conceived to justify" the different treatment afforded those engaged in harness and thoroughbred racing. *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961). The only attempt to provide such a basis is the claim of the defendant that the two classes are not treated differently because, occasionally, the Board, in its discretion, ignores Section 8022 and grants stays of suspension notwithstanding the unequivocal language of the proviso.[6] This fails to provide a "rational basis" for the discriminatory classifications, and the equal protection claim, therefore, is sufficiently substantial to require its review by a three-judge panel.

As noted above, the Racing and Wagering Board's regulations can result in the administrative review of the Board's suspension order becoming academic by the time they are completed. Consequently, the plaintiff alleges that he has been deprived of meaningful administrative

[6] At pages two and three of his affidavit John M. Dailey, counsel to the Board and its Chief Steward, specifically states: "Although the regulatory statutes are worded differently, the Board has always interpreted them both to authorize it in its discretion to defer or suspend any penalty imposed by track judges pending administrative review."

review, as well as his right to a presuspension hearing, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meanings of the Due Process Clause of the . . . Fourteenth [Amendment]." *Mathews* v. *Eldridge,* 424 U.S. 319, 332 (1976). "Protected interests in property are normally 'not created by the Constitution. Rather, they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits. *Board of Regents* v. *Roth,* 408 U.S. 564, 577 (1972)." *Goss* v. *Lopez,* 419 U.S. 565, 572-73 (1975).

Plaintiff has a property interest which falls within the protection afforded by the Fourteenth Amendment. New York's statutes and rules relating to the horse racing clothe the plaintiff with an entitlement to certain benefits. Parimutuel betting on horse races is an exception to New York's general proscription against gambling. McKinney's Const. Art. 1, § 9(1). Consequently, the horse racing industry in New York is heavily regulated. *See generally* McK. Unconsol. Laws §§ 7901 *et seq.* The plaintiff-trainer, as a licensee within that industry, has a legitimate claim to continue as a trainer licensed by the Board and, as a consequence, to continue in his profession, absent just cause for suspension or revocation of his license. *Cf. Bell* v. *Burson,* 402 U.S. 535, 539, (1971).[7] Therefore, he "may demand the procedural protections of due process", *Goss* v.

[7] It may also be argued that the action of the Board imposed a sufficient stigma on the reputation of the plaintiff so as to trigger procedural due process safeguards. *Arnett* v. *Kennedy, supra,* 416 U.S. at 157; *Board of Regents* v. *Roth, supra,* 408 U.S. at 573; *Wisconsin* v. *Constantineau,* 400 U.S. 433, 437 (1971). *But see Paul* v. *Davis,* —— U.S. ——, 96 S. Ct. 1155 (1976).

Lopez, supra at 573; *cf. Arnett* v. *Kennedy,* 416 U.S. 134, 164, (Powell, J., concurring), 171 (White, J., concurring and dissenting) (1974); *Goldberg* v. *Kelly,* 397 U.S. 254 (1970). "Having chosen to extend the right to . . . [engage in the horse racing business] to people of . . . [plaintiff's] class generally, . . . [New York] may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred." *Goss* v. *Lopez, supra* at 574. "Once it is determined that due process applies, the question remains what process is due", *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972), because "[t]he types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that Clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests." *Arnett* v. *Kennedy, supra* at 155. While the protections afforded the individual by the Due Process Clause may occasionally have to give way to the interests of the public and the state, such choices cannot be considered as failing to present substantial constitutional claims. New York State's Racing and Wagering Board's statutory scheme has never been tested by the United States Supreme Court on procedural due process grounds (or on any other basis for that matter). Furthermore, the decisions of the Court make one thing clear: what might be sufficient process in one situation, is woefully inadequate in others. The fluidity of the concept of procedural due process requires the weighing and balancing of many competing variables. The complexity of the interacting rights and interests here renders this claim patently "substantial", mandating closer inspection by a three-judge panel.

We are mindful of the general rule that the postponement of a hearing where an adequate one is subsequently provided, is permissible where a mere property right is

simply infringed. *Phillips* v. *Commissioner,* 283 U.S. 589, 596-97 (1931). *See Mitchell* v. *W.T. Grant Co.,* 416 U.S. 600, 611 (1974). Although the penalty assessed plaintiff was in the form of suspension of his license rather than revocation, the ramifications of the Board's action (permanent loss of assignments because of the need for continuous care, no means of redress if successful on administrative appeal, and the potential for being deprived of working rights in other states)[8] serve to aggravate the situation so that it more closely resembles a permanent, rather than a temporary penalty. *See Catrone* v. *Massachusetts State Racing Com'n,* 404 F.Supp. 765, 770 (D.Mass. 1975) (court notes unwritten agreements wherein penalties imposed against licensees are honored by other racetracks in North America). It may be, therefore, that the plaintiff has a right to review of the charges against him *before* suspension, *Board of Regents* v. *Roth, supra,* 408 U.S. at 569-70, or, at the least, an immediate and speedy review, which, under the present scheme, he was not afforded. Thus, the contention that plaintiff was not afforded an opportunity to be heard "at a meaningful time", *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965), is substantial.

Furthermore, it appears on this record that the use of the inferences of the "insurer rule" may have resulted in the summary abridgement of plaintiff's license. The effect of the rule, therefore, may be that even if there had been an immediate hearing the results would have been the same since no defense or explanation would have been acceptable. However, this merely serves to compound the problem. The constitutionality of this inference is a serious, substantial question requiring review by the full panel.

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[8] In a somewhat related case which is presently before this Court, it was admitted in oral argument that a New Jersey racing facility refused stable space to a trainer-driver who was then under suspension at Yonkers Raceway. *Daigneault et al.* v. *Yonkers Racing Corp.,* 76 Civ. 3999.

Opinion Convening Three-Judge District Court.

For the reasons stated, the three procedural issues raise substantial federal constitutional questions which are more than sufficient to require convocation of a three-judge court. The defendants' motion to dismiss is hereby denied pending further consideration by the three-judge court, which is hereby convened.

SO ORDERED:

Dated: New York, N.Y.,
December 23, 1976.

GERARD L. GOETTEL
U.S.D.J.